STATE OF MICHIGAN

IN THE SUPREME COURT

KEITH TODD,

Plaintiff-Appellant,

v

NBC UNIVERSAL (MSNBC),

Defendant-Appellee

and

EASTPOINTE POLICE DEPARTMENT, and A-ONE LIMOUSINE

Defendants.

Supreme Court No. 153049

Court of Appeals No. 323235

Wayne County Circuit Court
Case No. 14-004589-CZ

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PLAINTIFF-APPELLANT KEITH TODD'S SUPPLEMENTAL BRIEF

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction under MCR 7.303(B)(1) to grant leave to appeal from the Court of Appeals' unpublished opinion entered on December 10, 2015. Plaintiff-Appellant Keith Todd timely applied for leave to appeal on January 20, 2016. The Court ordered oral argument and supplemental briefing on whether to grant the application for leave to appeal on November 2, 2016.

ORIGINAL STATEMENT OF QUESTIONS PRESENTED

1. Whether the trial court, in evaluating the tort of intentional infliction of emotional distress' element that the alleged conduct by the defendant was extreme and outrageous, should include the *context* of Defendant's actions and the *position of authority* that Defendant holds to conclude that the issue is one for the trier of fact.

Court of Appeals says: No

Plaintiff Keith Todd says: Yes

Defendant NBC Universal (MSNBC) says: No

Trial court did not address this issue.

2. Whether the trial court's refusal to permit a hearing on Plaintiff's motion to amend his complaint was an abuse of discretion, particularly in light of the Court of Appeals' implication that the statute of limitations period of false light invasion of privacy was greater than that of defamation and therefore not expired.

Court of Appeals says: No

Plaintiff Keith Todd says: Yes

Defendant NBC Universal (MSNBC) says: No

Trial court refused to address the issue.

INTRODUCTION

This Court, in its order of November 2, 2016, requested additional briefing from the parties on three matters. Those matters are as follows: (1) whether the erroneous statements contained in the television show aired by the defendant NBC Universal (MSNBC) must be considered in context with the pertinent facts and circumstances surrounding the statements, and if so, whether the statements viewed in that context rise to the level of extreme and outrageous conduct; (2) whether the statements in question are protected by the First Amendment; and (3) whether the plaintiff should have been permitted to amend his complaint. The parties should not submit mere restatements of their application papers.

Mr. Todd refers the Court to his statement of facts contained in his application for leave to appeal.

STANDARDS OF REVIEW

This Court reviews *de novo* a trial court's grant of summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Decisions granting or denying motions to amend pleadings are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647, 655 (1997).

ARGUMENT

I. Defendant-Appellee MSNBC's defamatory statements should be considered in light of the relative position of the parties and the context of those statements, and those statements rise to the level of outrageousness that permit the issue to be decided by a jury.

This Court specifically cited the Restatement of Torts, 2d, when recognizing the elements of the tort of intentional infliction of emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602; 374 NW2d 905, 908 (1985). Those elements are (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Id*. The same Court further went on to expound on the element of extreme and outrageous conduct, again citing the Restatement at length:

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous . . . Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'
>
> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. [*Id.* at 602, 603, citing Restatement of Torts, 2d, comments d and g.]

In reviewing claims of intentional or reckless infliction of emotional distress, it is generally the trial court's duty to determine whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 92; 536 NW2d 824 (1995). Where reasonable minds may differ, whether a defendant's conduct is so extreme and outrageous as to impose liability is a question for the jury. *Id*.

The facts in this case, as limited as they are with no opportunity for discovery, bear out the reality that this is no example of a party blowing off "relatively harmless steam," nor is it an occasion where "mere insults" are at issue. MSNBC stated as a fact that Mr. Todd was engaged in serious criminal activity and played minutes of video purporting to show his criminal actions. MSNBC actively sought out (and aired) Mr. Todd's photo and personal information, even though he had no connection with the video being shown. MSNBC has great power over other people's lives with its massive production and distribution network. Mr. Todd is a private individual who at no time was asked about his unwitting participation in MSNBC's show.

Comment *e* of the Restatement further identifies the contours of intentional infliction of emotional distress when considering the relative position of both parties: "The extreme and outrageous character of the conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." Restatement of Torts, 2d, § 46.

While Michigan's Court of Appeals has addressed this issue of relative position, this Court has not.

For instance, in *Ledsinger v Burmeister*, 114 Mich App 12; 318 NW2d 558 (1982), the Court of Appeals stated that "[a]lthough the Restatement acknowledges that the law in this area is in a stage of development, it points toward a contextual approach. For example, the extreme and outrageous character of the conduct may arise from the position of the actor, his relation to the distressed party, or from his knowledge of peculiar susceptibilities of the distressed party." *Id.* at 19. The court in *Ledsinger* adopted the Restatement's language nearly word for word. In that case, a shop owner made racial slurs against an African-American patron and kicked him out of the store. The patron sued and the Court of Appeals concluded that the racial slurs, in

conjunction with the relative position of authority of the shop owner to the patron was, as a matter of law, outrageous enough to survive summary disposition and that the issue was one for the jury. "We believe the racial slurs in the instant case, taken in the context in which they were made, could be considered by a trier of fact to be extreme and outrageous." *Id.* at 20.

The United States District Court for the Eastern District of Michigan in *Wilson v Kiss*, 751 F Supp 1249, 1253 (ED Mich 1990) favorably cited *Ledsinger* in applying the contextual approach to this tort and cited additional Michigan Courts of Appeals opinions to support its position, referring to *Rosenberg v Rosenberg Bros*, 134 Mich App 342; 351 NW2d 563 (1984) (stating that repeated harassment together with plaintiff's position of financial dependency supported a tort claim for emotional distress) and *Margita v Diamond Mortgage Co,* 159 Mich App 181; 406 NW2d 268 (1987) (concluding that a mortgage company engaging in harassing phone calls and letters threatening foreclosure for a debt that was not outstanding might easily be considered extreme and outrageous conduct).

The *Wilson* court, in summarizing Michigan's Courts of Appeals on the issue, then went on to state "[i]n each case mentioned above, a combination of position, power, abuse, and significant perturbation rose above the level of mere insult, indignity, threat, annoyance, petty oppression and triviality to support a tort claim for mental distress." *Wilson*, supra, at 1254.

There is limited case law when it comes to the application of the tort of intentional infliction of emotional distress in situations where a news story is completely false, mostly likely because it's a matter of common sense that false news stories should not be protected. However, multiple courts, both state and federal, have addressed this tort in its application to newsworthy events when the issue is one of public importance and when the facts being reported were true. For instance, the Tenth Circuit Court of Appeals provided a review of cases where the tort of

intentional infliction of emotional distress was found to not apply when the news story was accurate:

> Courts regularly hold that upsetting but true news reports do not constitute conduct so extreme and outrageous as to permit recovery. Specifically, a New Mexico court has stated that "[a]s a general proposition, accurate publication of newsworthy events does not give rise to a cause of action for intentional infliction of emotional distress." *Andrews v* Stallings, 119 NM 478; 892 P2d 611, 625 (1995). Other courts agree. See, e.g., *Lowe v Hearst Commc'ns, Inc*, 414 FSupp2d 669, 676 (WD Tex 2006) (concluding that the "[p]ublication of truthful, albeit embarrassing, information has again and again been determined not to constitute extreme and outrageous conduct"); *Conroy v Kilzer*, 789 FSupp 1457, 1468 (D Minn 1992) (holding that statements that "accuse a public official of misconduct" are not "as a matter of law . . . sufficiently extreme and outrageous"); *Munoz v Am Lawyer Media, LP*, 236 Ga App 462, 512 SE2d 347, 351 (1999) (concluding that "the tort of intentional infliction of emotional distress will not provide a remedy to a plaintiff when the news media truthfully reports an actual newsworthy event, even if the event was so insulting as naturally to humiliate, embarrass or frighten the plaintiff"). Although this rule of thumb is at least in part a reflection of First Amendment constraints on tort law, see, e.g., *Howell v. NY Post Co*, 81 NY2d 115 (1993), it also serves to help the court "determine as a matter of law" whether the complained-of publication is "so extreme and outrageous," *Trujillo*, 41 P3d at 343, as to give rise to liability. [*Alvarado v KOB-TV, LLC*, 493 F3d 1210, 1222–23 (10th Cir 2007)]

This Court has not addressed the application of this tort when the event being reported on is done in an entirely false manner.

The United States Court of Appeals for the Fourth Circuit, in applying Virginia law (which also adopts the Restatement's elements of intentional infliction of emotional distress, as Michigan does) addressed the incorrect position that the newsworthiness of an event immunizes the defendant from the application of this tort and concluded that a false story defeats such immunization, as MSNBC has argued.

> The district court's conclusion that "[p]ublishing news or commentary on matters of public concern" can never be sufficiently extreme or outrageous to support a claim for intentional infliction of emotional distress sweeps too broadly. Depending upon the circumstances surrounding the publication and the nature of the defamatory charge, a defamatory publication could be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of

> decency." [*Hatfill v NY Times Co*, 416 F3d 320, 336 (4th Cir 2005) (internal citations omitted).]

Without repeating the analysis already done in Mr. Todd's application to this Court, Michigan's Court of Appeals has come to the same conclusion that factual newsworthy statements are not actionable under intentional infliction of emotional distress. See *Duran v The Detroit News*, 200 Mich App 622, 504 NW2d 715 (1993) (deciding that defendant when published the home address of a Columbian judge who was subject to death threats, intentional infliction of emotional distress could not be supported).

But, of course, this is not a case of a factual newsworthy event, it's a case of a completely false depiction of an innocent third party who had nothing to do with the event being depicted.

In contrast, see *Doe*, supra, at 92, where the Court of Appeals decided that the trial court had erred in dismissing a claim by a private plaintiff whose name was fished from a dumpster at an abortion clinic and her name published by the defendant.

Additional cases where the Court of Appeals found sufficient evidence to support a claim for intentional infliction of emotional distress are instructive, and include the following: *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 497 NW2d 585 (1993) (defendant coworker drew and circulated cartoon showing plaintiff and another coworker in sexually compromising position) and *Lewis v LeGrow*, 258 Mich App 175; 670 NW2d 675 (2003) (secretly videotaping intimate relations, even though it involved consensual sex).

MSNBC's statements, along with the context of those statements and relative position of the company, result in those statement being outrageous enough to survive summary disposition. It would be surprising if "reasonable minds" *didn't* agree that a media conglomerate, using its massive amount of power over other people's lives, and accusing an innocent young man of serious criminal activity on a national television broadcast (aired multiple times) *wasn't*

outrageous. MSNBC had the correct information in its possession, evidenced by the fact that the video cited the suspect's criminal record. But then MSNBC went *out of its way* to obtain Mr. Todd's driver's license photo and other personal details to air in conjunction with its broadcast. This isn't a mere "mistake" of stating a wrong name, it's unmitigated, dangerous recklessness.

II. MSNBC's statements are not protected by the First Amendment

Since the heart of this case is the defamatory statements by MSNBC, and the resulting damages that are compensated by multiple torts, First Amendment considerations are important. However, MNSBC's statements are not protected speech because they are defamatory and because Mr. Todd is a private figure plaintiff.

The Supreme Court of the United States has determined that the federal constitution imposes certain requirements on defamation actions independent of those established by the state's own law. See generally *Milkovich v Lorain Journal Co*, 497 US 1, 11–17 (1990). First, where the statements are uttered by a media defendant and involve matters of public concern, the plaintiff must shoulder the burden of proving the falsity of each statement. See *Philadelphia Newspapers, Inc v Hepps*, 475 US 767, 776 (1986). Second, only statements that are "provable as false" are actionable; hyperbole and expressions of opinion unprovable as false are constitutionally protected. See *Milkovich*, supra, at 19–20; Third, private individuals must prove fault amounting at least to negligence on the part of a media defendant, at least as to matters of public concern. See *Gertz v Robert Welch, Inc.*, 418 US 323, 347 (1974); Fourth, a private plaintiff must prove "actual malice" to recover presumed and punitive damages for a statement involving public concern. *Dun & Bradstreet, Inc v Greenmoss Builders, Inc*, 472 US 749, 756–57 (1985).

Certainly there is no *higher* First Amendment standard to be applied to torts other than defamation that involve speech. The tort of intentional infliction of emotional distress, when examined by the United States Supreme Court in *Hustler Magazine, Inc v Falwell*, 485 US 46 (1988) was applied with the heightened actual malice standard to the public-figure plaintiff in that case. The court summed up the First Amendment considerations succinctly:

> We conclude that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true. This is not merely a "blind application" of the New York Times standard, see *Time, Inc v Hill*, 385 US 374 (1967), it reflects our considered judgment that such a standard is necessary to give adequate "breathing space" to the freedoms protected by the First Amendment. [*Hustler Magazine*, supra, at 56-57]

Since Mr. Todd is a private figure plaintiff, and MSNBC has not disputed that fact, there is no actual malice standard applicable to him when applying the tort of intentional infliction of emotional distress. The statements by MSNBC are provably false and are not, in any way, hyperbole. MSNBC's argument that the show at the center of this case is one of "public concern" and therefore deserving of a higher First Amendment standard is not applicable here because the statements made in MSNBC's show are false and provably defamatory, and that's why MSNBC retracted its broadcast. The only application of an actual malice standard would be if punitive damages were being demanded. At this stage of the case, such damages considerations would be a matter for the trial court and jury to decide since there has been no discovery.

There is no case law in Michigan or in the Sixth Circuit which directly addresses whether the tort of false light invasion of privacy is constrained by the First Amendment in the way that defamation is—depending to the type of plaintiff. As explained above, private-figure plaintiffs only need to prove negligence in defamatory publication while public figure plaintiffs have a

heightened "actual malice" standard applied to them. This line of reasoning has been continued by other United States Courts of Appeals, including in the Fifth Circuit where the same approach was applied to a false light invasion of privacy claim. The court in *Braun v Flynt*, 726 F2d 245 (5th Cir 1984), quoted *Gertz* in stating the following:

> That designation [as public official/public figure] may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. [*Braun*, supra, at 249-250].

The court then went on to apply this standard to the plaintiff in that case, concluding that she was not a public-figure plaintiff, nor a limited public-figure plaintiff, and that the heightened "actual malice" standard did not apply to her false light invasion of privacy case. "We therefore conclude that Mrs. Braun is a private individual and that Chic is not entitled to the protection of the First Amendment applicable to public figures as such standard was enunciated by *New York Times v Sullivan* and its progeny." *Braun*, supra, at 250.

United States Court of Appeals for the First Circuit cited *Braun* favorably when applying the same First Amendment considerations to the private-figure plaintiffs in that case, coming to the conclusion that the fault standards applied in defamation cases applied to false light invasion of privacy claims. See *Fudge v Penthouse Int'l, Ltd*, 840 F.2d 1012, 1018 (1st Cir 1988).

To summarize, MSNBC's defamatory statements at the heart of this case are not afforded any heightened First Amendment protection because Mr. Todd is a private-figure plaintiff and MSNBC's reporting was false.

III. The trial court abused its discretion in refusing to hold a hearing on Mr. Todd's motion to amend his complaint

The Court of Appeals below decided that Mr. Todd's claim for intentional infliction of emotional distress was not barred by the statute of limitations, therefore the trial court's dismissal of Mr. Todd's complaint should not have occurred pursuant to MCR 2.116(C)(7), but would have been appropriate under MCR 2.116(C)(8). Accordingly, MCR 2.116(I)(5) applies, stating that the court "shall" give a party an opportunity to amend a complaint if it is dismissed under MCR 2.116(C)(8). As this Court ruled in *Labar v Cooper*, 376 Mich 401; 137 NW2d 136 (1965) where there is nothing on the record to support the reasoning for a trial court's decision to deny an amendment to a complaint, an appellate court is "unable to say whether he exercised his discretion properly." *Id*. at 409. Here there was not only a refusal to allow Mr. Todd to amend his complaint, there was a refusal to even allow a hearing on the matter.

This Court in *Labar*, supra, was examining the amendment of a complaint in the context of the 'relation back' doctrine as it relates to the statute of limitations, not unlike the situation here. This Court, in applying the General Court Rules of the time, stated that "[i]t is thus beside the point that the amendment introduces new facts, a new theory, or even a different cause of action, so long as it springs from the same transactional setting as that pleaded originally." *Id*. at 406 (emphasis removed from original).

This Court further likened Michigan's rule on amending pleadings to the Federal Rules of Civil Procedure, citing the United States Supreme Court in holding that "amendments which conform to Fed.R.Civ.P. 15 should be decided on their merits, not on technicalities." *Id*. at 139.

It's important to note that in *Labar* the case was already substantially progressed; pretrial was complete and the case was set to go to trial in two weeks. This Court found no prejudice to

the defendant because no additional discovery would be needed—the plaintiff was solely adding counts to his original complaint. In this case, nothing had occurred other than the filing of the complaint and the hearing of motions for summary disposition. No discovery had been done at all.

This Court has positively cited *Labar* in other cases as well. In *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649, 658; 213 NW2d 134, 138 (1973), this Court stated that "[t]he discretion confided to trial judges under the standard, 'leave shall be freely given when justice so requires,' is not boundless . . . Judge (now Justice) T. G. Kavanagh wrote, '(W)e believe that (this) language * * * imposes a limitation on the discretion of the court necessitating a finding that justice would not be served by the amendment.'" The footnote cited in that paragraph states,

> Similarly, the Kentucky Court of Appeals in *Ashland Oil & Refining Co v Phillips*, 404 SW2d 449, 450 (Ky 1966), explained the working of its court rule also providing that leave to amend shall be 'freely given when justice so requires.' In effect, the Court stated that 'justice' 'requiring' was not a prerequisite for the filing of an amendment. Rather, such an amendment will be denied only if it would work 'an injustice in the particular circumstance'. [*Id*. at footnote 3.]

MSNBC has offered nothing to claim that it would be prejudiced by allowing Mr. Todd to amend his complaint. Indeed, there is no circumstance that MSNBC can point to that would evidence any such prejudice since "prejudice" refers to matters which would prevent a party from having a fair trial, or matters which they could not properly contest, e.g. when surprised. It does not refer to the effect on the result of the trial otherwise. *Fyke*, supra, at 657.

CONCLUSION AND REQUESTED RELIEF

This Court previously declined to hear *Melson ex rel Melson v Botas*, 497 Mich 1037, 863 NW2d 674 (2015), which involved a claim for intentional infliction of emotional distress. With this Court's denial of leave to appeal, Justice Markman dissented with the view that the case was an opportunity to better define the "outrageous" element of that tort. While this case presents a different aspect of the threshold that the "outrageous" element presents from *Melson*, Mr. Todd believes that this Court would add clarity to Michigan law by deciding the factors relevant in the *context* and *relative position* aspects of the "outrageous" element. Mr. Todd believes, at a minimum, he has reached the threshold for a trial court to present the issue to the jury so that he may have his day in court.

Finally, because there are no First Amendment barriers in this case to his other speech-related claim (false light invasion of privacy), Mr. Todd further asks that this court permit him to pursue his case so that there is no miscarriage of justice. The facts that this case presents are straightforward and clear—Mr. Todd was wronged by MSNBC and he should have the opportunity to pursue his claims.

Mr. Todd thanks this Court for considering his case and respectfully asks for the relief requested in his application for leave to appeal.

Respectfully submitted,

/s/ Jeff Steinport

Date: December 14, 2016

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